FILE COPY

FILED
AUG 11 1958
JOHN T. FEY, Clerk

No. 183

In the Supreme Court of the United States

OCTOBER TERM, 1958

CARLOS PRIO SOCARRAS AND DANIEL VASQUEZ COEJO,
PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:	Page
Gulf Oil Corporation v. *Gilbert*, 330 U.S. 501	4
Kott v. *United States*, 163 F. 2d 984, certiorari denied, 333 U.S. 837	4
Tivoli Realty v. *Interstate Circuit*, 167 F. 2d 155, certiorari denied, 334 U.S. 837	4
United States v. *White*, 95 F. Supp. 544	4
Statutes and rules:	
18 U.S.C. 960	1
28 U.S.C. 1404	4
Federal Rules of Criminal Procedure:	
Rule 21	2, 4
Rule 21(b)	2, 3, 5
Rule 22	5-6
Rule 40	2

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 183

CARLOS PRIO SOCARRAS AND DANIEL VASQUEZ COEJO, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On February 13, 1958, an indictment (Pet. App. 8-12) was returned in the United States District Court for the Southern District of New York charging petitioners and other named defendants with having conspired, in that District and elsewhere, to set on foot, furnish money for, and take part in military expeditions from within the United States against the Republic of Cuba, a foreign state with which the United States was at peace, in violation of 18 U.S.C. 960. Approximately one week later, petitioners were

arrested in Miami in the Southern District of Florida. They were accorded a preliminary hearing in the United States District Court for that District in connection with proceedings under Rule 40, Federal Rules of Criminal Procedure, to remove them to the Southern District of New York for trial, and were released on bond (Pet. App. 19-20).

On March 7, 1958, petitioners filed in this same court (*i.e.*, the District Court for the Southern District of Florida) a motion to transfer the pending criminal prosecution to that court from the District Court for the Southern District of New York (Pet. App. 13-17). This motion purported to be filed pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, which provides as follows:

> RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL
>
> * * * *
>
> *(b) Offense Committed in Two or More Districts or Divisions.*
>
> The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.
>
> * * * *

On May 5, 1958, the District Court (Choate, D. J.) entered an order and opinion (Pet. App. 31-35) denying the motion on the ground that, while "[u]ndoubtedly, the defendants have a right to apply under Rule 21(b) for a transfer of this cause" (Pet. App. 34), and "[w]hile the rule itself does not state that the Court where the charge is pending has exclusive control over transfer" (*ibid.*), such exclusive control by the court in which the charge is pending "is implied" by the terms of the rule (*ibid.*). The denial was "without prejudice to [petitioners'] right to apply to the Court in the Southern District of New York" for the transfer sought (Pet. App. 35).

On May 21, 1958, petitioners filed in the United States Court of Appeals for the Fifth Circuit a motion for leave to file a petition for a writ of mandamus (Pet. App. 1-3)—to which was attached the petition proposed to be filed (Pet. App. 4-6)—directing Judge Choate to "act upon and exercise his discretion as set forth in Rule 21(b)" (Pet. App. 2). On May 27, 1958, the Court of Appeals entered a *per curiam* order, without opinion, denying the leave sought (Pet. App. 37). The petition for a writ of certiorari, filed July 16, 1958, seeks review of this judgment.

The decision of the District Court—that under Rule 21(b) only the court in which the criminal indictment or information is pending has power to transfer the cause to another district under the conditions and for the reasons stated therein—is clearly correct, and the petition for mandamus by which petitioners seek to compel the District Court to act under the Rule is, accordingly, without merit. In

any event, the action of the court below in denying leave to file the petition for mandamus presents no question warranting review by this Court.

Rule 21 simply sets forth certain conditions under which the accused in a criminal prosecution may seek a change of venue. But, historically and logically, the court to which application must be made for a change of venue is the court in which the indictment is pending. Cf. *Kott* v. *United States*, 163 F. 2d 984, 987 (C.A. 5), certiorari denied, 333 U.S. 837; *United States* v. *White*, 95 F. Supp. 544 (D. Neb.).[1] Petitioners in this case have asked the court *to* which they desire to have the prosecution transferred to order such transfer, completely by-passing the court *from* which they would have the cause transferred. Their interpretation of the Rule is in the face of its plain terms (at least its clear implication, as the District Court noted), is completely without precedent, and is logically unsupportable. To adopt such an interpretation would mean that the court in which a prosecution is brought could be ousted of its power to hear the case, without its consent, by the order of a sister court of coordinate jurisdiction.[2]

---

[1] And cf. *Ticoli Realty* v. *Interstate Circuit*, 167 F. 2d 155, 156 (C.A. 5), certiorari denied, 334 U.S. 837, pointing out that the doctrine of *forum non conveniens* (see 28 U.S.C. 1404)—which is the civil-law analogue of a motion to transfer a criminal prosecution under Rule 21, F.R. Crim. P.—"involves the use of discretion on the part of *the court in which the suit is brought*" (emphasis added). See also *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501, 508.

[2] It is evident, furthermore, that the proper administration of justice could be seriously impaired if courts other

Petitioners, as noted by the District Court here, are of course entitled to seek to have their prosecution transferred from the New York District Court to the Florida District Court and to present such reasons as they may have why such transfer would, in their opinion, be "in the interest of justice". But their application for such transfer must, for the reasons stated, be addressed in the first instance to the court in which their indictment is pending.[3]

---

than the court in which an indictment was pending could each determine the merits of a motion to transfer. Suppose, for example, that multiple defendants, each residing in a different district, were indicted in one district and arrested in their home districts. If petitioners' position were tenable, each such defendant could move in the district of his arrest for transfer of the cause to that district. The result might well be conflicting decisions and multiple trials where only a single trial would be proper. It was doubtless with such a result in mind that the District Court in the case at bar, in denying petitioners' motion to transfer, observed that, "in order to prevent confusion and differences between Courts, and to preserve the inherent right of a Court to control all of its own cases, * * * the matter of transfer should be heard by the Court in which the case is pending" (Pet. App. 35).

[3] Petitioners (Pet. 5) urge that "An interpretation of Rule 21(b), Federal Rules of Criminal Procedure, which would require a defendant qualified thereunder to go to a far distant place to submit to any step in the course of a criminal proceeding, would frustrate the purpose and intent of the rule and the fair administration of justice." The District Court, although disclaiming jurisdiction under Rule 21(b), stated (Pet. App. 31) it was "impressed" with that argument.

But the problem posed is wholly hypothetical on the facts of this case, for no such interpretation has yet been made. Thus far, petitioners have made no effort to have the New York District Court consider a Rule 21(b) motion without the presence of the petitioners in that district. Rule 22, it

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

AUGUST 1958.

---

should be noted, expressly provides that "A motion to transfer under these rules may be made at *or before* arraignment * * *" (emphasis added); an appearance by the petitioners in the New York District Court for the purpose of pleading to the indictment, therefore, is not a prerequisite to a proper motion to transfer. Whether petitioners' presence might be required for other reasons (*e. g.*, the taking of testimony at a hearing on the motion if affidavits and depositions were deemed inadequate) is wholly speculative at this juncture.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 • 475022 155